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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 91

ALFONSO BATTAGLINO, PETITIONER

v.

GEORGE C. MARSHALL, SECRETARY OF STATE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 48-51) is reported at 172 F. 2d 979. The opinion of the District Court (R. 35-40) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 3, 1949 (R. 52). The petition for a writ of certiorari was filed May 28, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Petitioner was born in Italy of a parent who previously had been naturalized as a citizen of the United States, but who, within five years of his naturalization, returned to Italy. Thereafter, petitioner's father's certificate of citizenship was canceled by a default judgment entered against him pursuant to Section 15 of the Naturalization Act of 1906. The question is whether petitioner is a citizen of the United States.

STATUTES INVOLVED

Section 1993 of the Revised Statutes [1] provided in pertinent part as follows:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; * * *.

Section 15 of the Naturalization Act of June 29, 1906, 34 Stat. 601, as amended, 40 Stat. 544 (8 U. S. C. [1934 ed.] 405),[2] provided in pertinent part as of the date petitioner's father's certificate of citizenship was canceled:

> That it shall be the duty of the United States district attorneys for the respective districts

[1] Repealed and superseded by the Nationality Act of 1940, §§201 and 504 (8 U. S. C. 601, 904).

[2] Repealed and superseded by the Nationality Act of 1940, §§338 and 504 (8 U. S. C. 738, 904).

or the Commissioner or Deputy Commissioner of Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper

proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

* * *

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

STATEMENT

Petitioner's father, Antonio Battaglino, a native of Italy, now deceased, was naturalized in the Court of Common Pleas of Essex County, New Jersey, on October 31, 1893 (R. 3, 10, 31). Early in 1897, Antonio returned to Italy, where he married the following year (R. 10). An affidavit of a purported friend of Antonio indicates that he may have returned to the United States in 1900 and remained until 1906 (R. 33), but it is not disputed that he

did not return to this country after that time. Petitioner, who was born in Italy late in 1898, came to this country in 1924 on an American passport issued to him in Italy, after he had taken an oath of allegiance to the United States (R. 3-4, 10-11). Petitioner subsequently married an American citizen, who has since died, and a daughter born of the marriage now lives with him in New York (R. 11). Since petitioner's arrival in this country, he has voted and exercised other "prerogatives" and assumed the "obligations" of a citizen of the United States (R. 4, 11). In 1933 he went into the restaurant business with a partner and since that time they have secured liquor licenses from the New York State Liquor Authority. Petitioner alleged that applicants for such licenses must be American citizens. (R. 4, 11-12; see also R. 28-29.)

In November 1946, petitioner applied for a passport as an American citizen to enable him to visit in Italy. In a letter dated December 6, 1946, denying the application, the State Department informed petitioner that in the opinion of the Department he was "not an American citizen," since his father's certificate of naturalization had been cancelled by a final decree in May 1925, pursuant to the provisions of the second paragraph of Section 15 of the Act of June 29, 1906, *supra,* because he had established a permanent residence in Italy within five years after his naturalization. In the same letter, petitioner was advised that if he desired to

become naturalized he should communicate with the nearest naturalization examiner. (R. 12, 31-32.)

Instead, in January 1947, pursuant to Section 503 of the Nationality Act of 1940, 8 U. S. C. 903,[3] petitioner instituted this action in the United States District Court for the Eastern District of New York for a declaratory judgment that he is a citizen (R. 2, 3-5). Both parties moved for summary judgment (R. 8-9, 34) and petitioner's motion was granted (R. 41-42). The Court of Appeals for the Second Circuit reversed with directions to grant respondent's motion for summary judgment (R. 52).

ARGUMENT

The court below held that the cancellation of a certificate of citizenship under Section 15 of the Naturalization Act of 1906, *supra*, pp. 2-4, whether on the ground of actual or presumptive fraud, nullified the certificate *ab initio* and vitiated any derivative rights of citizenship arising out of the certificate (R. 50-51). We think this is a correct interpretation of that statute and that the contentions urged in the petition for a writ of certiorari

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[3] "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

involve no question of sufficient current importance to warrant further review by this Court.

Petitioner concedes that if his father's certificate had been canceled on the ground of actual fraud, the certificate would have been rendered void *ab initio* and that he would have no justification for claiming citizenship. *Rosenberg* v. *United States,* 60 F. 2d 475, 476 (C. A. 3), certiorari denied, 287 U. S. 645; *United States* v. *Schlotfeldt,* 136 F. 2d 935, 939-940 (C. A. 7), certiorari denied *sub nom. Krause* v. *United States,* 327 U. S. 781. He argues, however, that since his father's certificate was cancelled on the ground of presumptive fraud pursuant to the provisions of the second paragraph of Section 15, the certificate must be considered to have been valid in its inception and that his derivative rights, having become fixed before it was cancelled, were not affected by the judgment. (Pet. 9, 11.)

This Court has not recognized such a distinction as petitioner suggests. Denaturalization under Section 15 of the 1906 Act, whether based on actual or presumptive fraud, resulted in "the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." *Luria* v. *United States,* 231 U. S. 9, 24; see also *Johannessen* v. *United States,* 225 U. S. 227. As the court below pointed out (R. 51), the *Luria* case, which sustained the validity of the second paragraph of Section 15,

demonstrates that "the distinction between what is called presumptive fraud and actual fraud is but a difference in the manner of proof to establish the fact that the applicant for citizenship did not intend 'to become a permanent citizen of the United States at the time of filing his application for citizenship' [Sec. 15]."

Moreover, the legislative history of Section 15 shows that Congress did not intend any such distinction as petitioner urges. The second paragraph of that section was not in the bill as reported, but was added on the floor of the House. Congressman Crumpacker, who proposed the addition, stated that it was "aimed chiefly at the class of aliens who come here for the sole purpose of securing citizenship to be used abroad to protect them against the impositions and exactions of foreign countries where they intend to permanently live." He said that citizenship obtained under such circumstances is based upon a fraudulent representation that the applicant "intended to become a permanent resident of this country, when, in fact, he did not," and that his amendment would provide "a rule of evidence by which courts may, in the absence of contrary proof, infer a fraudulent design on the part of the holder of the certificate in the first instance to secure citizenship for improper purposes." "Fraud," the Congressman continued, "vitiates all proceedings and can be the basis of no

right in law.[4] It [i. e., his amendment] is in line with the theory of section 17 of the bill [sec. 15 as enacted], and I am sure that its adoption would afford much relief to the country in a direction where some specific remedy is badly needed." 40 Cong. Rec. 7040. Congressman Crumpacker's amendment was adopted without change. Compare 40 Cong. Rec. 7041 with the second paragraph of section 15, *supra*, pp. 3-4.

It is thus clear that Congress regarded an applicant's subjective intent not to become a permanent resident of the United States but to take up foreign residence after securing American citizenship as fraud upon the naturalization court to be treated as any other fraud, i. e., as vitiating the grant of citizenship. Congress was dealing with fraud in the procurement of American citizenship and for the first time it provided for the cancellation of certificates procured by fraud. The fact that it added a special "rule of evidence" (*Luria* v. *United States, supra*, at p. 25) to be applied in a proceeding to cancel the certificate of a naturalized person who, within the specified period, returned to his native land or took up other foreign residence, thus indicating that he had no intention to reside permanently in the United States, furnishes no basis for a contention that the effects of cancellation in such

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[4] Earlier in his discussion of Section 15, Congressman Crumpacker said: "A certificate tainted with fraud is in the sense of the law no certificate at all." 40 Cong. Rec. 7040.

a proceeding are different than the effects flowing from cancellation of a certificate upon direct proof of fraud of any other character. In either case, the result is "the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled." *Luria* v. *United States, supra,* at p. 24.

In further support of its conclusion that petitioner did not derive citizenship through his father, the Court of Appeals pointed out that in Section 338(d) of the Nationality Act of 1940 (54 Stat. 1159, 8 U. S. C. 738(d)),[5] Congress changed prospectively the effect of cancellation of a certificate for presumptive fraud upon those claiming derivatively under the certificate (R. 51). Petitioner contends that it is more likely that Section 338(d) was enacted out of an abundance of caution to emphasize what the prior law had been and to enact into statute the judicial decisions and congressional views on the subject (Pet. 15). In this connection petitioner cites, without more, Hearings before the House Committee on Immigration and

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[5] "The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided*, That this subsection shall not apply in any case where the revocation and setting aside of the order was the result of actual fraud."

Naturalization on H. R. 6127, superseded by H. R. 9980 (subsequently enacted as the Nationality Act of 1940), 76th Cong., 1st sess., pp. 312-313.

There is no warrant for this contention. In the first place the language of Section 338(d) presupposes that without its prospective saving provision, the cancellation of the citizenship of a parent would result in the loss of derivative rights, for it provides that where such cancellation occurs "after the effective date of this Act, [it shall not] result in the loss of citizenship or any right or privilege of citizenship *which would have been derived by or available to* a wife or minor child of the naturalized person *had such naturalization not been revoked*" (italics supplied).

The legislative history of Section 338(d) also shows that Congress intended to change what it deemed to be the prior law. Section 338(d) was not included in the original draft of the bill, but was incorporated by the House Committee on Immigration and Naturalization as the result of a suggestion by a private group (Hearings, *supra*, pp. 313, 397). That the Committee considered Section 338(d) would change existing law is clear from the following colloquy in respect of the proposal (*id.*, 313)—

> Mr. Hazard.[6] The Department of Labor agreed to it because of the hardships in the case

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[6] Director of Research, Information, and Education, Immigration and Naturalization, Labor Department (*id.*, 31).

of children who had to be deported where the parents had been naturalized and later naturalization was canceled, the children having come into the United States in the meantime.

Mr. Rees. Is there anyone here who wants to discuss the reason for that further?

Mr. Mason. I do not see any objection to it. If we revoke a father's citizenship because of certain actions and the child should become a citizen, I do not see why it should apply to the child also.

Mr. Hazard. Some of the courts have taken that view.

Mr. Mason. Yes; I understand that, and this is changing that. I have no objection to this change.

Mr. Lesinski. If there is no objection, the same stands approved.

The significance of Section 338(d) and its legislative history are further emphasized when considered in connection with Section 319(a) of the Nationality Act of 1940 (54 Stat. 1148, 8 U. S. C. 719(a)) and its legislative history. The latter section, in part, established a special procedure for the naturalization of "A person who as a minor child *lost* citizenship of the United States *through the cancelation of the parent's naturalization* on grounds other than actual fraud or presumptive fraud as specified in the second paragraph of section 15 of the Act of June 29, 1906, * * *" (italics supplied). Here again, the language of the new statute presupposed that under the prior law de-

rivative rights were vitiated upon cancellation of a parent's certificate. And again, the legislative history shows that Congress was cognizant of that interpretation of the prior law. The explanatory notes accompanying the draft of the President's committee for the revision and codification of the nationality laws, upon which the Nationality Act of 1940 was based, shows that the attention of Congress was directed to the decision in *Rosenberg* v. *United States,* 60 F. 2d 475 (C. A. 3), *supra,* p. 7, and the opinion of the Attorney General in the case of *Pietro Mariani,* 36 Ops. Att'y Gen. 446. Hearings, *supra,* pp. 448-449.

In the *Rosenberg* case, the court held that a certificate granted to Rosenberg and later cancelled under Section 15 of the Naturalization Act of 1906 on the ground of actual fraud conferred "no rights whatever" (p. 476) on him or his wife. In the *Mariani* case, the Attorney General ruled, on the basis of *Luria* v. *United States, supra,* that the cancellation of Mariani's certificate under Section 15 on the ground of presumptive fraud vitiated the derivative rights of Mariani's wife and child because the certificate was a "nullity" (p. 449).

The testimony of Mr. Shoemaker, Deputy Commissioner of Immigration and Naturalization, before the House Committee indicates that the Immigration and Naturalization Service had long relied on the precedents established in the *Rosenberg* and *Mariani* cases. Mr. Shoemaker stated that "It has

been held generally that where a certificate of naturalization is canceled for fraud or illegal procurement, anyone, whether the person or one claiming under or through him loses all status." Significantly, he used as an illustration of the application of the prior law, the following example: "Take a case where an individual was naturalized in 1910, and 5 years after that naturalization the person went abroad, and the child remained in the United States. The child acquired citizenship through the act of the father. In 1940, say that the certificate is canceled, that would divest that child of his American citizenship status, despite the fact that he has been in the United States all of that time, and this [i. e., Sec. 319(a)] would cure that." Hearings, *supra*, p. 100.[7]

In an attempt to distinguish this case from *Luria* v. *United States*, 231 U. S. 9, petitioner contends that there was actually countervailing evidence to rebut the presumption of a lack of intention on the part of his father to become a permanent resident of the United States, since it appears that his father resided in this country between 1900 and 1906 (see p. 4, *supra*, Pet. 9-10). Not only was

[7] It may be noted that as drafted and enacted, Section 319(a) did not benefit a child whose parent was denaturalized under the prior law for presumptive or actual fraud, for such denaturalizations were expressly excepted in the section. However, this part of Section 319(a) is no longer operative, for children whose parents were denaturalized under the prior law had only two years from the date of denaturalization or two years from the effective date of the 1940 act to invoke its special provisions for naturalization.

there no issue in the district court as to the validity of the cancellation of his father's certificate (see R. 16), but petitioner expressly disclaimed any intention to attack that judgment when the case was before the Court of Appeals (R. 49).[8] Moreover, the resolution of any such issue would depend upon the facts as to the father's residence and they were not developed in the district court. This Court has repeatedly said that questions not raised below will not be considered here. *Luria* v. *United States,* 231 U. S. 9, 17; *Duignan* v. *United States,* 274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701-702; *Becker Co.* v. *Cummings,* 296 U. S. 74, 80; *Sonzinsky* v. *United States,* 300 U. S. 506, 514.

Petitioner also contends that the effect of the decision below is to revoke his citizenship on a condition subsequent (Pet. 15) and that the construction of the 1906 act adopted by the court below makes the act "*ex post facto* in nature and spirit" (Pet. 17). There is no warrant for these contentions. Admittedly, the initial validity of his father's certificate was a condition precedent to the validity of petitioner's claim of citizenship. Petitioner's father was required to have had an intention of remaining a resident of this country when he obtained his certificate of citizenship. *Luria* v. *United States,* 231 U. S. 9, 22-24. The denaturalization judgment shows that the father had no such

[8] Consequently, as the Court of Appeals also noted (R. 49), "There is here no issue like that decided in *Klapprott* v. *United States,*" 335 U. S. 601, 336 U. S. 942, 949.

intention. Section 15 of the 1906 act was not ex post facto legislation; it merely deprived petitioner's father of a right to which he was not lawfully entitled. *Luria* v. *United States,* 231 U. S. 9, 26; *Johannessen* v. *United States,* 225 U. S. 227; *United States* v. *Dietz,* 52 F. Supp. 201, 202 (N. D. Calif.); *United States* v. *Holtz,* 54 F. Supp. 63, 66 (N. D. Calif.), affirmed *sub nom. Kuehn* v. *United States,* 162 F. 2d 716 (C. A. 9), certiorari denied, 332 U. S. 837.

Finally, petitioner contends there was a patent ambiguity in the 1906 act, because it made no provision in respect of the effect of the cancellation of a naturalization certificate on derivate rights (Pet. 17). This argument, which is based on *Perkins* v. *Elg,* 307 U. S. 325, 337, lacks merit. In that case, this Court held that an American born child did not lose her citizenship as the result of the *expatriation* of her naturalized parent. There, the child was a citizen at birth, regardless of the nationality of her parents. Here, petitioner has no rights of citizenship other than under the naturalization certificate of his father, and as we have shown, there was no necessity for providing for the revocation of derivate rights of citizenship which were entirely dependent on the initial validity of a basic naturalization certificate.[9]

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[9] Such cases as *United States* v. *Eliasen,* 11 F. 2d 785 (W. D. Wash.), and *Haaland* v. *Attorney General of the United States,*

The only decisions in conflict with the decision below, and indeed the only other reported decisions dealing with the precise issue presented here, are district court decisions in *In re Findan,* 4 F. Supp. 189 (D. R. I.), and *In re Bolter,* 66 F. Supp. 566 (S. D. Calif.). In neither of these cases, however, was there any reference to the legislative history of either the 1906 or the 1940 act or to the *Luria* decision of this Court. And in the *Bolter* case, the court relied largely upon the *Elg* decision. As we have pointed out above, and as the court below observed (R. 50), such reasoning is erroneous, for it fails to take account of "the required distinction * * * between the effect of a cancellation of a certificate of citizenship based on its invalidity *ab initio* and a cancellation based on the loss of citizenship by expatriation of the kind which leaves the certificate of citizenship valid at the time issued and up to the date when citizenship is lost."

As we have indicated, the question presented by this case affects only the derivative rights of those who claim through one who was denaturalized under the 1906 act. Section 338(d) of the 1940 act, as we have pointed out, preserves the derivative rights of the wife or minor children of a person who is denaturalized under the provisions of that act,

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42 F. Supp. 13 (D. Md.), also cited by petitioner as being in conflict with the decision below, involved expatriation and are similarly inapposite.

except where the denaturalization is "the result of actual fraud."

Finally, it should be noted that petitioner is a lawful resident of the United States and that, if he is qualified as "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" (Sec. 307, Nationality Act of 1940, 8 U. S. C. 707), he may now be naturalized as the surviving husband of a deceased citizen-wife without first filing a declaration of intention, pursuant to the provisions of Section 310 of the Nationality Act of 1940, 8 U. S. C. 710.[10]

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[10] *United States ex rel. Willumeit* v. *Watkins*, 171 F. 2d 773 (C. A. 2), certiorari granted June 27, 1949, No. 82, and *United States ex rel. Eichenlaub* v. *Watkins*, 167 F. 2d 659 (C. A. 2), certiorari denied, 335 U. S. 867, order denying certiorari vacated and certiorari granted June 27, 1949, No. 3, involve the question whether cancellation of a certificate of citizenship for actual fraud pursuant to the provisions of the Nationality Act of 1940 renders the person so denaturalized subject to deportation on account of his conviction, prior to the cancellation, of a crime for which an alien may be deported.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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